# Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-04-22-1994
ZAKARIA YATIM, MAHADEV SHANKAR AND ABU MANSOR JJCA
15, 20 APRIL 1995

***Civil Procedure*** *— Appeal — Interference by appellate court — Whether High Court judge correct in interfering with findings of trial judge — Whether judge can reverse findings without considering credibility of witness*

***Contract*** *— Formation — Concluded contract — Agreement not dated and signed by only one party — Whether there was concluded contract which could be enforced — Whether only an offer to enter into the agreement by the party which signed*

***Contract*** *— Damages — No available market — Measure of damages — Subject matter not readily available on market — What is proper measure of damages*

***Contract*** *— Terms — Condition precedent — Whether vague and ambiguous — Whether agreement void for uncertainty*

The appellant ('Matang') was the owner of a machine ('the machine') which it leased out under a credit finance agreement to another company ('the lessee'). The lessee's performance of the agreement was guaranteed by one Teh. The lessee defaulted in paying the instalments due and Matang wanted to repossess the machine. On 3 February 1986, the respondent ('Metalco') entered into an oral agreement with Matang whereby Matang agreed to sell the machine to Metalco for RM65,000. The managing director of Metalco later signed an undated standard form supplied by Matang entitled 'sale and purchase agreement' which was however not signed by Matang. The agreement, inter alia, provided that the purchase price was RM65,000 and that the sale was subject to the lessee's right to redeem the machine within 14 days ('the first condition'). With the authority of Matang, Metalco then repossessed and transported the machine back to its premises. Matang later sold the machine to a third party for RM85,000 and removed the machine from Metalco's premises. Metalco alleged that Matang was in breach of the oral agreement and claimed special damages. It was contended that the machine had been sold for RM65,000 subject only to the right of the lessee to redeem the machine within 14 days, which the lessee did not exercise. Matang, however, argued that the sale was subject to a further condition that no higher prices were offered by other interested purchasers ('the second condition'). Matang submitted that as it had received a higher offer of RM85,000, and Metalco refused to increase its offer, it was under no obligation to sell the machine to Metalco for

RM65,000. The sessions court, relying heavily on the evidence of the guarantor, accepted the existence of the second condition and decided in favour of Matang. At the High Court, however, the judge reversed the sessions court's decision and awarded damages to Metalco. Matang then appealed to the Court of Appeal. The main issue to be decided was whether the High Court judge was right in finding, contrary to the finding of the sessions court, that the agreement was only subject to the first condition and not the second.

**Held** by a majority, dismissing the appeal (Zakaria Yatim JCA dissenting):

(1) (Per **Mahadev Shankar JCA**) Where a question of fact has been tried by a judge, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(2) (Per **Mahadev Shankar JCA**) The appellate court, either because the reasons given by the trial judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

(3) (Per **Mahadev Shankar JCA**) The witnesses were testifying to events which occurred three or more years before the giving of testimony. Therefore, whether or not there was a second condition had to be determined on the totality of the evidence with particular reference to the contemporaneous documents.

(4) (Per **Mahadev Shankar JCA**) The fact that the appellant had not dated or signed the sale and purchase agreement did not mean that there could be no concluded contract. Where a contract had been signed by one party only, it could be enforced where there was evidence, such as part performance by one party and acceptance by the other, that the other party had elected to be bound by it.

(5) (Per **Mahadev Shankar JCA**) On the facts of the case, the sessions court judge, even though enjoying the benefit of seeing the witnesses, had reached a decision which could not be sustained and the High Court judge was correct in interfering with the decision. Inter alia: (a) the testimony of the guarantor about the existence of the second condition was given undue weight by the sessions court judge; (b) the guarantor, though a witness for Metalco, was not Metalco's servant or agent and his admission could not bind Metalco; and (c) Matang failed to

satisfactorily explain why a standard sale and purchase agreement form, which it normally used when a sale was intended, was used instead of a standard offer to purchase form. Furthermore, the alleged second condition was not stated therein whereas it could easily have been typed in.

(6) (Per **Mahadev Shankar JCA**) The machine was not a standard item which was readily available in the market in terms of specification or price. The proper measure of damages to be awarded to Metalco was a sum of money which would restore Metalco to its status before the seizure of the machine by Matang, ie the difference in the price at which the machine was bought by Metalco and the price at which it was later resold by Matang plus all the abortive expenditure which Metalco had incurred in transporting and installing the machine in its premises.

Cases referred to

*Aronson v Mologa Holzindustrie AG Leningrad* (1927) 32 Com Cas 276; (1927) 138 LT 470 (folld)

*Buckhouse v Crossby* (1737) 2 Eq Cas Abr 32; 22 ER 28 (refd)

*C & P Haulage (a firm) v Middleton* [1983] 3 All ER 94; [1983] 1 WLR 1461 (refd)

*Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 (refd)

*Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292; [1953] 2 All ER 1257; [1953] 3 WLR 923 (refd)

*Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd* [1994] 1 MLJ 553 (refd)

*Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 (folld)

*Hadley v Baxendale* [1843–60] All ER Rep 461; (1854) 9 Exch 341 (folld)

*Jag Singh v Toong Fong Omnibus Co Ltd (No 2)* [1962] MLJ 122; [1962] MLJ 271 (CA) (refd)

*Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17 (folld)

*Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor* [1979] 2 MLJ 207 (refd)

*Manikam Mandor v S Muriandi Thevar* [1939] MLJ 130 (refd)

*Powell v Streatham Manor Nursing Home* [1935] AC 243; [1935] All ER Rep 58 (refd)

*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 (refd)

*Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171 (refd)

*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; [1949] 1 All ER 997 (refd)

*Watt or Thomas v Thomas* [1947] AC 484; [1947] 1 All ER 582 (refd)

(7) (Per **Abu Mansor JCA**) An appellate court should not lightly reverse the finding of a trial court. However, on the facts of the case, the High Court judge had acted correctly, having considered the evidence before him, to reverse the finding of the sessions court judge. There was a concluded agreement of sale of the machine and the appellant's subsequent action of repossession of the machine from the respondent was a breach of contract for which the respondent was entitled to damages.

(8) (Per **Zakaria Yatim JCA**, dissenting) The sessions court judge clearly understood the difficult facts before him and made his findings based on those facts. There was no justification whatsoever for the High Court judge to arrive at a different conclusion and he had therefore erred in interfering with the decision of the trial judge.

(9) (Per **Zakaria Yatim JCA**) The trial judge had taken into consideration the credibility and demeanour of the guarantor whose testimony in cross-examination he heavily relied upon to support Matang's case that the second condition existed. The High Court judge, however, did not question the credibility or demeanour of the guarantor whose evidence in re-examination he strongly relied on. The High Court judge was thus in error when he interfered with the decision of the trial judge.

(10) (Per **Zakaria Yatim JCA**) The second condition was vague and ambiguous and thus void for uncertainty. The oral agreement was thus also void for uncertainty. Even if the second condition were valid, the oral agreement was merely a conditional agreement. Since the second condition had not been fulfilled, there was no sale at all.

(11) (Per **Zakaria Yatim JCA**) Even if the oral agreement was subject to only the first condition, Metalco had failed to make payment after the expiry of the redemption period given to the lessee. Matang was therefore at liberty to sell the machine to a third party.

(12) (Per **Zakaria Yatim JCA**) The written agreement was only signed by Metalco. This act of Metalco only constituted an offer to enter into a sale and purchase agreement in respect of the machine. As Matang had not signed the agreement, there was no sale and purchase agreement in writing between the parties.

Cases referred to

*Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165 (folld)
*Diamond Peak Sdn Bhd & Anor v DR Tweedie* [1982] 1 MLJ 97 (refd)
*Financings Ltd v Stimson* [1962] 3 All ER 386; [1962] 1 WLR 1184 (folld)

*Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 (refd)
*Jones, Re* [1895] 2 Ch 719 (distd)
*Laythoarp v Bryant* 132 ER 283 (distd)
*Lee Phek Choo v Ang Guan Yau & Anor* [1975] 2 MLJ 146 (refd)
*Lee-Parker & Anor v Izzet & Ors (No 2)* [1972] 2 All ER 800; [1972] 1 WLR 775 (refd)
*MN Guha Majumder v RE Donough* [1974] 2 MLJ 114 (refd)
*National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 (refd)
*Ng Eng Wah v The Getz Corp (Singapore) Sdn Bhd* [1989] 3 MLJ 71 (refd)
*New Eberhardt Co, Re* (1890) 43 Ch D 118 (follD)
*Selvanayagam v University of the West Indies* [1983] 1 All ER 824; [1983] 1 WLR 585 (refd)
*Watt (or Thomas) v Thomas* [1947] AC 484; [1947] 1 All ER 582 (follD)
*Whitehouse v Jordan & Anor* [1981] 1 All ER 267; [1981] 1 WLR 246 (follD)

**Obiter:**

(Per **Mahadev Shankar JCA**) The facts proved gave rise not only to a cause of action for breach of contract on Matang's part but also established that it had committed conversion.

**[Bahasa Malaysia summary**

Perayu ('Matang') adalah pemunya sebuah mesin ('mesin itu') yang telah disewa kepada sebuah syarikat lain ('penyewa itu') di bawah satu perjanjian pembiayaan kredit. Pelaksanaan perjanjian itu oleh penyewa itu telah digerenti oleh seorang bernama Teh ('penggerenti itu'). Penyewa itu telah ingkar membuat bayaran ansuran dan Matang ingin mendapat balik mesin itu. Pada 3 Februari 1986, responden ('Metalco') telah membuat suatu perjanjian lisan dengan Matang di mana Matang bersetuju menjual mesin itu kepada Metalco untuk RM65,000. Pengarah urusan Metalco kemudiannya menandatangani satu borang lazim yang tidak bertarikh yang bertajuk 'perjanjian jual beli' yang disediakan oleh Matang. Borang itu, walau bagaimanapun, tidak ditandatangani oleh Matang. Perjanjian itu memperuntukkan, antara lainnya, bahawa harga jualan adalah RM65,000 dan bahawa jualan itu adalah tertakluk kepada hak penyewa itu untuk menebus balik mesin itu dalam tempoh 14 hari ('syarat pertama'). Dengan kebenaran Matang, Metalco telah mengambil balik dan memindahkan mesin itu balik ke premisnya sendiri. Matang kemudiannya telah menjual mesin itu kepada satu pihak ketiga untuk RM85,000 dan mengalihkan mesin itu daripada premis Metalco. Metalco mendakwa bahawa Matang telah mengingkari perjanjian lisan itu dan menuntut

ganti rugi khas. Telah dihujah bahawa mesin itu telah dijual untuk RM65,000 tertakluk hanya kepada hak penyewa itu untuk menebus balik mesin itu dalam masa 14 hari, dan hak itu tidak digunakan oleh penyewa itu. Matang, walau bagaimanapun, mendesak bahawa jualan itu juga adalah tertakluk kepada satu syarat lain, iaitu ketiadaan harga lebih tinggi yang ditawarkan oleh pembeli-pembeli lain yang berminat ('syarat kedua'). Matang berhujah bahawa oleh kerana ia telah menerima tawaran yang lebih tinggi sebanyak RM85,000, dan Metalco enggan menaikkan tawarannya, ia tidak berkewajipan menjual mesin itu kepada Metalco pada harga RM65,000. Mahkamah sesyen telah bergantung kuat kepada keterangan penggerenti itu dan bersetuju bahawa syarat kedua itu wujud dan membuat keputusan yang memihak kepada Matang. Namun demikian, di Mahkamah Tinggi, hakim telah menterbalikkan keputusan mahkamah sesyen itu dan memberikan ganti rugi kepada Metalco. Perayu kemudiannya membuat rayuan kepada Mahkamah Rayuan. Isu utama yang mesti diputuskan ialah sama ada hakim Mahkamah Tinggi adalah betul apabila beliau berpendapat, bertentangan dengan pendapat mahkamah sesyen, bahawa perjanjian itu adalah tertakluk cuma kepada syarat pertama itu dan bukan kepada syarat yang kedua.

**Diputuskan** oleh majoriti, menolak rayuan itu (Zakaria Yatim HMR bertentangan):

(1) (Oleh **Mahadev Shankar HMR**) Apabila satu soalan fakta telahpun dibicarakan oleh seorang hakim, dan tidak terdapat soal salah arahan ke atas dirinya oleh hakim itu, suatu mahkamah rayuan yang cenderung ke arah membuat kesimpulan yang lain atas keterangan yang tercatat, tidak seharusnya berbuat demikian melainkan jika ianya berpuas hati bahawa sebarang kelebihan yang dialami oleh hakim perbicaraan akibat melihat dan mendengar saksi-saksi sendiri, tidaklah mencukupi untuk menerangkan atau menjustifikasikan kesimpulan hakim itu.

(2) (Oleh **Mahadev Shankar HMR**) Mahkamah rayuan, sama ada kerana alasan-alasan yang diberikan oleh hakim perbicaraan itu tidak memuaskan, atau memandangkan ianya ketara dari keterangan, mungkin berpuas hati bahawa beliau tidak menggunakan kelebihannya dalam melihat dan mendengar saksi-saksi itu dengan wajar, dan perkara itu kemudiannya boleh diputuskan oleh mahkamah rayuan sendiri.

(3) (Oleh **Mahadev Shankar HMR**) Saksi-saksi di dalam kes ini telah memberi keterangan tentang kejadian yang berlaku tiga tahun atau lebih sebelum pemberian keterangan itu. Oleh itu, sama ada atau tidak terdapat syarat yang kedua itu mestilah ditentukan atas keseluruhan keterangan dengan rujukan tertentu kepada dokumen-dokumen semasa.

(4) (Oleh **Mahadev Shankar HMR**) Hakikat bahawa perayu tidak meletakkan tarikh atau menandatangani perjanjian jual beli itu

tidak bermakna bahawa tidak mungkin terdapat kontrak yang terikat. Apabila sesuatu kontrak itu telah ditandatangani oleh satu pihak sahaja, ianya boleh dikuatkuasakan di mana terdapat keterangan, seperti pelaksanaan sebahagian oleh satu pihak dan penerimaan oleh pihak yang satu lagi, bahawa pihak yang lain itu telah membuat pilihan supaya diikat oleh perjanjian itu.

(5) (Oleh **Mahadev Shankar HMR**) Atas fakta-fakta kes ini, hakim mahkamah sesyen, walaupun telah mendapat kelebihan melihat saksi-saksi, telah mencapai keputusan yang tidak boleh disokong dan hakim Mahkamah Tinggi adalah betul apabila beliau bercampur tangan dalam keputusan itu. Antara lainnya: (a) keterangan yang diberikan oleh penggerenti itu tentang kewujudan syarat kedua itu telah diberi pertimbangan yang tidak wajar oleh hakim mahkamah sesyen; (b) penggerenti itu, biarpun seorang saksi untuk pihak Metalco, bukannya pekerja atau ejen Metalco dan pengakuannya tidak boleh mengikat Metalco; dan (c) Matang gagal menjelaskan dengan sempurna mengapa satu borang lazim perjanjian jual beli, yang biasanya digunakan apabila satu jualan dimaksudkan, telah digunakan dan bukan satu borang lazim tawaran untuk membeli. Lagipun, syarat kedua yang didakwa itu tidak dinyatakan di dalamnya walhal memang mudah untuk memasukkan syarat tersebut.

(6) (Oleh **Mahadev Shankar HMR**) Mesin itu bukanlah satu benda yang biasa yang boleh didapati dengan mudah di pasaran dari segi spesifikasi dan harga. Ukuran ganti rugi yang betul untuk diberikan kepada Metalco adalah sejumlah wang yang boleh mengembalikan semula Metalco ke kedudukannya sebelum mesin itu diambil balik oleh Matang, yakni perbezaan di antara harga apabila mesin itu dibeli oleh Metalco dan harga apabila ia kemudiannya dijual oleh Matang berserta dengan kesemua perbelanjaan yang telah dialami oleh Metalco dalam mengangkut dan memasang mesin itu di premisnya.

(7) (Oleh **Abu Mansor HMR**) Sebuah mahkamah rayuan tidak seharusnya menterbalikkan keputusan suatu mahkamah perbicaraan dengan terlalu mudah. Walau bagaimanapun, atas fakta-fakta kes ini, hakim Mahkamah Tinggi telah bertindak dengan betul, selepas mempertimbangkan keterangan di hadapannya, apabila beliau menterbalikkan keputusan hakim mahkamah sesyen itu. Terdapat satu perjanjian yang terikat untuk jualan mesin itu dan tindakan terkemudian Matang dalam mengambil balik mesin itu daripada Metalco adalah satu keingkaran kontrak dan Metalco berhak mendapat ganti rugi.

(8) (Oleh **Zakaria Yatim HMR**, menentang) Hakim mahkamah sesyen itu jelasnya memahami fakta-fakta sukar di depannya dan telah membuat keputusannya berasaskan fakta-fakta tersebut. Tidak ada asas sama sekali untuk hakim Mahkamah Tinggi mencapai kesimpulan yang berlainan dan beliau lantaran

itu salah apabila bercampur tangan dengan keputusan hakim perbicaraan.

(9) (Oleh **Zakaria Yatim HMR**) Hakim perbicaraan telah bergantung kuat kepada keterangan penggerenti itu semasa pemeriksaan balas untuk menyokong kes Matang bahawa syarat kedua itu wujud tetapi hakim itu telah memberi pertimbangan kepada kebolehpercayaan dan perilaku penggerenti itu. Hakim Mahkamah Tinggi, namun demikian, bergantung kuat kepada keterangan penggerenti semasa pemeriksaan semula tetapi beliau tidak menyoal kebolehpercayaan dan perilaku penggerenti itu. Hakim Mahkamah Tinggi oleh itu adalah salah apabila beliau bercampur tangan dengan keputusan hakim perbicaraan.

(10) (Oleh **Zakaria Yatim HMR**) Syarat kedua itu adalah taksa dan tidak jelas dan oleh itu ianya tidak sah akibat ketidakpastian. Perjanjian lisan itu juga tidak sah kerana ketidakpastian. Biarpun syarat kedua itu sah, perjanjian lisan itu hanyalah satu perjanjian bersyarat. Oleh kerana syarat kedua itu tidak dipenuhi, maka tidak terdapat suatu jualan sama sekali.

(11) (Oleh **Zakaria Yatim HMR**) Sekalipun perjanjian lisan itu tertakluk hanya kepada syarat yang pertama, Metalco telah gagal membuat bayaran selepas luputnya tempoh masa untuk penebusan balik yang diberikan kepada penyewa itu. Matang oleh itu bebas menjual mesin itu kepada satu pihak ketiga.

(12) (Oleh **Zakaria Yatim HMR**) Perjanjian bertulis itu cuma ditandatangani oleh Metalco. Tindakan Metalco itu cuma membentuk satu tawaran untuk memasuki satu perjanjian jual beli berkenaan dengan mesin itu. Oleh kerana Matang tidak menandatangai perjanjian itu, tidak terdapat perjanjian jual beli bertulis di antara pihak-pihak itu.

**Obiter**:

(Oleh **Mahadev Shankar JCA**) Fakta-fakta yang dibuktikan menimbulkan bukan sahaja suatu kausa tindakan untuk kemungkiran kontrak oleh Matang tetapi juga menunjukkan bahawa ia telah melakukan konversi.]

**Notes**:

For a case on a concluded contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1575.

For cases on damages in contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1442–1494.

For cases on conditions precedent, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1578, 2206–2212.

For cases on interference by an appellate court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 465–469.

**Complete list of cases referred to**

*Aronson v Mologa Holzindustrie AG Leningrad* (1927) 32 Com Cas 276; (1927) 138 LT 470
*Buckhouse v Crossby* (1737) 2 Eq Cas Abr 32; 22 ER 28
*C & P Haulage (a firm) v Middleton* [1983] 3 All ER 94; [1983] 1 WLR 1461
*Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165
*Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41
*Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292; [1953] 2 All ER 1257; [1953] 3 WLR 923
*Diamond Peak Sdn Bhd & Anor v DR Tweedie* [1982] 1 MLJ 97
*Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd* [1994] 1 MLJ 553
*Financings Ltd v Stimson* [1962] 3 All ER 386; [1962] 1 WLR 1184
*Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257
*Hadley v Baxendale* [1843–60] All ER Rep 461; (1854) 9 Exch 341
*Jones, Re* [1895] 2 Ch 719
*Jag Singh v Toong Fong Omnibus Co Ltd (No 2)* [1962] MLJ 122
*Laythoarp v Bryant* 132 ER 283
*Lee Phek Choo v Ang Guan Yau & Anor* [1975] 2 MLJ 146
*Lee-Parker & Anor v Izzet & Ors (No 2)* [1972] 2 All ER 800; [1972] 1 WLR 775
*Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17
*Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor* [1979] 2 MLJ 207
*MN Guha Majumder v RE Donough* [1974] 2 MLJ 114
*Manikam Mandor v S Muriandi Thevar* [1939] MLJ 130
*National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211
*Ng Eng Wah v The Getz Corp (Singapore) Sdn Bhd* [1989] 3 MLJ 71; [1989] 2 CLJ 712
*Powell v Streatham Manor Nursing Home* [1935] AC 243; [1935] All ER Rep 58
*New Eberhardt Co, Re* (1890) 43 Ch D 118
*Selvanayagam v University of the West Indies* [1983] 1 All ER 824; [1983] 1 WLR 585
*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777
*Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171
*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*
*Watt (or Thomas) v Thomas* [1947] AC 484; [1947] 1 All ER 582
*Whitehouse v Jordan & Anor* [1981] 1 All ER 267; [1981] 1 WLR 246

**Legislation referred to**

Companies Act 1965
Contracts Act 1950 s 74(1)
Evidence Act 1950 s 143(a)

Sale of Goods Act 1957 ss 4, 25(1), 42
Attorneys and Solicitors Act 1870 s 4 [UK]
Companies Act 1867 s 25 [UK]
Statute of Frauds 1677 s 4 [UK]

**Appeal from**: Civil Appeal No 12–23 of 1991 (High Court, Johor Bahru)

*Chok Chin You* (*Yeo, Tan, Hoon & Tee*) for the appellant.
*Tan Hock Kim* (*Tan & Tan*) for the respondent.

*Cur Adv Vult*

20 April 1995

**Zakaria Yatim JCA** (dissenting): The respondent filed an action against the appellant in the Sessions Court, Johor Bahru claiming special damages in the sum of RM48,770 together with interest and costs for a breach of an oral agreement. The action was tried in the sessions court and at the end of the trial the learned sessions court judge dismissed the respondent's claim with costs. The respondent appealed to the High Court. Haidar J allowed the appeal with costs. With the leave of this court, the appellant now appeals to this court against the decision of the learned judge.

The appellant is a limited company incorporated under the Companies Act 1965. It was the owner of a machine known as 'Hydraulic Press 300 Tons' ('the said machine'). The appellant had leased the said machine to a company known as Pembinaan Siap Sdn Bhd ('the lessee') in Batu Pahat. The lessee had defaulted in paying the instalments due and the appellant wanted to repossess it. The respondent is a limited company incorporated under the Companies Act 1965. On 3 February 1986, the respondent entered into an oral agreement with the appellant in the appellant's office in Johor Bahru whereby the appellant agreed to sell the said machine to the respondent for RM65,000. On the same date, the managing director of the respondent, Mr Peh Hai Lim (PW2), who was present at the meeting when the oral agreement was reached between the parties, signed a document entitled 'Sale and Purchase Agreement'. The document was undated and it is not in dispute that the appellant did not sign the document until today. Pursuant to the oral agreement, the respondent, on 18 February 1986, sent its representatives to Batu Pahat to make arrangements to remove the said machine from the premises of the lessee. The respondent had constructed a concrete foundation for the machine at its premises in Johor Bahru. The machine was then duly transported to the respondent's premises. On 21 March 1986, Mr Peh Hai Lim left for Taiwan. While he was in Taiwan, the appellant, on 25 March 1986, sold the machine to a third party for RM85,000 and removed the machine from the respondent's premises.

The respondent alleged that the appellant was in breach of the said oral agreement and claimed special damages. The respondent contended that under the oral agreement, the appellant had sold the said machine to

A the respondent for RM65,000 subject to the right of the lessee to buy it back from the appellant after the appellant had served due notice on the lessee. The lessee did not redeem the machine.

The appellant contended that it agreed to sell the machine to the respondent at the price of RM65,000 subject to the condition that no B higher prices were offered by other interested purchasers. The appellant further contended that it had received a higher offer of RM85,000, but the respondent refused to increase its offer to RM85,000. According to the appellant, it was under no obligation to sell the machine to the respondent for RM65,000.

C The learned sessions court judge, in his grounds of judgment, made the following finding at p 4. He referred to the evidence of the appellant's witness (DW2) who said that the sale of the said machine to the respondent was subject to two conditions, namely:

(1) if the lessee redeemed the machine within two weeks, the oral D agreement was deemed to be cancelled; and

(2) the appellant would only sell the machine to the highest bidder, after the machine was advertised.

The learned sessions court judge accepted DW2's evidence. In his grounds of judgment on the same page, he stated that, from the evidence of DW2, E it was not possible for the appellant to sell the machine to the respondent on 3 February 1986 because the lessee was given the liberty to redeem the machine. The oral agreement was also subject to the condition that the machine would only sold to the 'highest bidder'. The learned sessions court judge concluded by saying that the oral agreement was subject to conditions. He said that if the conditions had not been satisfied, the F agreement had not been concluded. He found that the conditions had not been complied with and he accordingly dismissed the respondent's claim with costs.

Haidar J did not accept the finding of the learned sessions court judge. In his grounds of judgment, the learned judge said that from the G outset of his grounds of judgment, the learned sessions court judge admitted that it was difficult to understand the facts of the case and at times they were rather boring. According to the learned judge, the remark of the learned sessions court judge reflected his frame of mind and his attitude in considering the case before him. The learned judge was referring to the H first paragraph of the grounds of judgment of the learned sessions court judge, which reads as follows:

> Kes ini berkisar atas fakta-fakta yang agak sukar difahami dan kadang-kadang agak membosankan tetapi selepas mengkaji secara teliti, saya telah tidak teragak-agak menolak kes plaintif. Selepas mendengar kenyataan saksi-saksi dan selepas membaca hujah-hujah kedua-dua peguam, saya dapati I bahawa pihak plaintif telah tidak berjaya membuktikan kes beliau. Oleh yang demikian, kes ini ditolak dengan kos.

From the above paragraph, it is true that the learned sessions court judge admitted that the facts were difficult to understand and were at times

boring, but he emphasized that, after examining the facts carefully, he did not hesitate to dismiss the respondent's claim. He said that after hearing the evidence of the witnesses and after reading the written submissions of both counsel, he found that the respondent had failed to prove its case.

The learned judge, however, proceeded to go through the evidence to see whether the sessions court judge's finding of fact was supported by the evidence before him. In his grounds of judgment, the learned judge said:

> As regards ground (i), PW3 clearly stated that the sale of the machine was subject to one condition only, that is, provided the lessee did not redeem the machine on receipt of two weeks' notice. Though under cross-examination PW3 seemed to agree to the question of there being other offers, PW3 subsequently corrected himself in re-examination to say that there was only one condition, that is, the right of redemption by the lessee and further explained that too many questions were asked and that he had just recovered from illness. The learned sessions court judge did not seem to give a proper consideration of the evidence of PW3. In my view, PW3 is entitled to correct his evidence under re-examination, giving his reasons. In this case, the learned sessions court judge did not seem to give adequate consideration on the explanation of PW3 when he subsequently corrected his evidence.
>
> The evidence that there was only one condition would seem to find support in the fact that the respondent [Heller] prepared the agreement (at pp 205–206 of [the record of appeal] ('RA')) and the price of RM65,000 was stated therein and the appellant [Metalco] passed a resolution for the purchase of the machine at RM65,000 (see pp 205–206 of RA). Further, if it is intended only to be a mere offer to purchase at RM65,000, as alleged, the respondent would have used their form 'Offer to purchase' ( see p 251 of RA) to be followed later by a sale and purchase agreement (see pp 254–255 of RA) which would appear to be the standard practice in the sale to DW1. If it is not intended to be a binding contract, there would appear to be no reason for the machine to be transported to the factory of the appellant from Batu Pahat and for the appellant to engage Koh Chin Boon to do the concrete foundation for installation of the machine thereby incurring expenses. In my view, the acts of the appellant clearly showed that the appellant accepted the machine and thereby bought it (see s 42 of the Sale of Goods Act 1957). The reason why payment was not made was explained by PW2 (see p 53 of RA), that is, payment would be made two weeks after the lessee did not take back the machine. All the facts would seem to support the contention of the appellant that there was only one condition. The learned sessions court judge did not seem to give due consideration to all these facts.

From the passage quoted above, it is clear that the learned judge drew his own inferences and made his own finding of fact based on the appeal record before him.

In my view, the learned sessions court judge gave his reasons, based on the evidence before him, why he found that the agreement was subject to two conditions. He said, at p 2 of his grounds of judgment:

> Plaintif telah menafikan bahawa perjanjian ini akan diterima sekiranya beliau adalah 'the highest bidder'. Saya terpaksa menolak penafian ini

A kerana saksi-saksi yang lain telah dengan jelasnya menerangkan di mahkamah bahawa ini adalah satu-satunya syarat yang telah mereka dengar semasa perbincangan antara plaintif dengan saksi-saksi yang lain (sila lihat kenyataan PW3 di mana beliau telah terdengar bahawa syarat perjanjian antara PW2 dengan defendan termasuk isu 'highest bidder').

B At the bottom of the same page, he stated as follows:

Apabila PW3 telah dipanggil semula (recalled), beliau mengesahkan bahawa bagi kepentingan beliau, eloklah jika terdapat seorang pembeli untuk mesin berkenaan memandangkan beliau adalah penjamin kepada penyewa mesin itu. Di ms 84, saksi ini mengesahkan bahawa PW2 telah memberitahunya pada 2 Februari 1986 bahawa mesin itu tidak boleh dipakai jika tidak C diubahsuai terlebih dahulu. Pada 3 Februari 1986, lebih kurang jam 10 hingga 11 pagi, beliau telah bersama-sama dengan Ong Ah Kiat dan PW2 di mana beliau terdengar bahawa perjanjian pembelian mesin itu tidak akan wujud melainkan tawaran PW2 adalah tawaran yang tertinggi (highest bid).

He then concluded, 'Dari kenyataan saksi plaintif di atas, iaitu PW3, D plaintif tertakluk kepada syarat tawaran yang tertinggi.'

Upon reading the grounds of judgment of the learned session court judge, I am satisfied that he clearly understood the difficult facts before him and made his finding based on those facts. The learned judge, however, made a different finding. The issue here is one of credibility. The learned E judge therefore had erred in interfering with the decision of the learned sessions court judge. See *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 at p 264. Even if it was alleged that the sessions court judge had come to a conclusion which was diametrically opposed to the testimony of the witnesses, the appellate court was bound to accept his decision. See *Watt (or Thomas) v Thomas* [1947] AC 484 at F p 492; [1947] 1 All ER 582 at p 591. See also *Selvanayagam v University of the West Indies* [1983] 1 All ER 824 at p 826; [1983] 1 WLR 585 at p 587 and *Ng Eng Wah v The Getz Corp (Singapore) Sdn Bhd* [1989] 3 MLJ 71. In the present case, I am satisfied that the decision of the learned session court judge was not diametrically opposed to the evidence of the G witnesses. In *Watt (or Thomas) v Thomas*, Lord Thankerton stated the principle to be applied by the appellate court when considering the decision of the trial judge on the evidence before him. Lord Thankerton said ([1947] AC 484 at pp 487–488; [1947] 1 All ER 582 at p 587):

I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may H be stated thus: (i) where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; I (ii) the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (iii) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so

> appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

The learned judge, in his grounds of judgment referred to *Watt (or Thomas) v Thomas*. He stated the principle as contained in the headnote as follows:

> Where the reasons given by the trial judge are not satisfactory, or because it unmistakenly so appears from the evidence, the appellate court may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses.

Applying the principle laid down by Lord Thankerton and the headnote relied upon by the learned judge, I find no justification whatsoever for the learned judge to arrive at a different conclusion. The learned judge also referred to the Privy Council decision in *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165. In that case, the Privy Council decided as follows:

> The circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial are limited. But when a trial judge, has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error lest otherwise the error result in serious injustice.

At pp 168–169, the Privy Council said:

> Their Lordships respectfully agree with the Court of Appeal that the findings favourable to the appellant were arrived at 'without an adequate scrutiny and consideration of all the evidence before him'.

The learned judge also relied on the decision of the House of Lords in *Whitehouse v Jordan & Anor* [1981] 1 All ER 267; [1981] 1 WLR 246. In that case, the House of Lords decided as follows ([1981] 1 All ER 267 at p 268):

> Although the view of the trial judge (who had seen and heard the witnesses) as to the weight to be given to their evidence was always entitled to great respect, where his decision on an issue of fact was an inference drawn from the primary facts and depended on the evidentiary value he gave to the witnesses' evidence and not on their credibility and demeanour, an appellate court was just as well placed as the trial judge to determine the proper inference to be drawn and was entitled to form its own opinion thereon.

The learned judge relied heavily on the evidence of PW3 in re-examination when the witness subsequently corrected himself and said that the agreement was subject to only one condition. It is to be noted that PW3 was not a member of the appellant company or the respondent company. He stood as guarantor when the leasing agreement was entered into between the appellant and the lessee. His liability as a guarantor would be reduced if the machine was sold to the highest bidder. The learned judge did not question the credibility or the demeanour of PW3. The learned sessions

court judge, however, in his grounds of judgment, noted that PW3 was a guarantor. He also referred to the relevant point in PW3's evidence (when he was recalled) where the witness confirmed that it was in his interest as guarantor to get a buyer for the machine. In my opinion, the learned sessions court judge had taken into consideration the question of the credibility of PW3. It is also implicit that he had considered the witnesses' demeanour.

I shall now consider the two conditions in the oral agreement. I shall begin with the second condition, namely, that the agreement was subject to the condition that the appellant would sell the machine to the highest bidder after the machine was advertised. The question here is whether the second condition was valid in law. In my opinion this condition was void for uncertainty. In *Lee-Parker & Anor v Izzet & Ors (No 2)* [1972] 2 All ER 800; [1972] 1 WLR 775, a contract for the sale of a piece of land was subject to a special condition which made the first defendant's obligation to sell and the third defendant's obligation to buy dependant on the obtaining of a satisfactory mortgage. Goulding J decided that the condition was void for uncertainty. In the present case, the second condition was vague and ambiguous. There was no certainty that the respondent would be able to comply with such a condition. In *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211, Salleh Abas CJ (Malaya), as he then was, in delivering the judgment of the Federal Court, said at p 219 as follows:

> However, even if we hold that the requirement as to FIC approval is no more than a term — essential term of the agreement, the result would still be the same. If it is a mere term of the contract the non-approval by FIC of the deal certainly defeats the sale because such an approval would then constitute a supervening event rendering the contract void under s 57(2) of the Contracts Act.

In the circumstances, I find that the oral agreement is void for uncertainty. But if my finding is wrong and the second condition was valid in law, the oral agreement is to be treated as a conditional agreement. Under s 4 of the Sale of Goods Act 1957, the said agreement is an agreement to sell. An agreement to sell becomes a sale when the conditions are fulfilled subject to which the property in the goods is to be transferred.

Although the machinery was taken to the respondent's premises, the respondent was merely in possession of it. The appellant was at all material times the owner of the machinery. Since the second condition had not been fulfilled, there was no sale at all and the property in the goods had never been transferred to the respondent. The learned judge referred to the fact that the respondent had transported the machinery to Johor Bahru and had prepared the concrete foundation. He then concluded that the acts of the respondent clearly showed that the respondent accepted the machine and thereby brought it. He then referred to s 42 of the Sale of Goods Act. In my view, s 42 does not arise here since the oral agreement was subject to the two conditions. According to the evidence of DW2, the appellant agreed to pay RM3,000 as transport charges if the sale did not

go through. This evidence is reflected in the grounds of judgment of the learned session court judge. The question of storage charges and other expenses did not arise at that time because the conditions of sale had not been fulfilled yet. A

I shall now turn to the first condition. The oral agreement was concluded on 3 February 1986. If the two-week redemption period commenced from 3 February 1986 then it expired on or about 17 February 1986. By a notice in writing dated 22 February 1986 (D10), the appellant gave the lessee the option to redeem the machine. If the two-week redemption period commenced from 22 February 1986, then it expired on or about 7 March 1986. Whether the expiry date was 17 February 1986 or 7 March 1986, there is no doubt that the sale had not been concluded because the second condition had not been fulfilled. On 18 March 1986, the machine was advertised for sale in the newspapers. Even if the oral agreement was subject to only the first condition, the respondent had failed to fulfil the said condition. The learned judge said in his grounds of judgment that the '... reason why payment was not made was explained by PW2 ... that is, payment will be made two weeks after the lessee did not take back the machine'. But it is not in dispute that no payment was made after the expiry of the redemption period, that is, after 17 February or 7 March 1986. Even if the second condition did not exist, the respondent had failed to fulfil the first condition and in the circumstances the appellant was at liberty to advertise the machine on 18 March 1986. It is not in dispute that the respondent had not paid the sum of RM65,000 to the appellant to this day. B C D E

Mr Tan Hock Kim told this court that the title in the property passed from the appellant to the respondent on 3 March 1986. With respect, I am unable to accept this proposition because the second condition had not been fulfilled on that date. F

I should mention here that although the machine was in the possession of the respondent, it did not mean that the title in the goods had passed to the respondent in the circumstances of this case. See s 25(1) of the Sale of Goods Act 1957. In the circumstances, it was proper for the appellant to advertise the sale of the machine in the newspapers. G

Mr Tan Hock Kim, counsel for the respondent told us that the document entitled 'Sale and Purchase Agreement' was a written contract. He said the price stated therein was RM65,000. He submitted that the respondent's story was a more probable story. He gave several reasons in support of his submission. Firstly, he said that the written agreement which was produced by the appellant contained all the terms including the price of RM65,000. Secondly, if the price was subject to the highest offer, it was meaningless to insert the figure RM65,000 in the document. Thirdly, the machine was delivered to the respondent. H

It is not in dispute that the document referred to by Mr Tan Hock Kim was only signed by the respondent. It was never signed by the appellant. The document is also undated. It is pertinent to note that cl 2 I

of the document contained a provision which stated that '... the property in the goods/equipment ... shall pass from the seller to the buyer upon the execution of this agreement ...'. It is not in dispute that the appellant did not execute the document.

The question to be considered now is whether the said document is, in law, a contract. In England, a purchaser of a leasehold property who signed a memorandum of purchase was bound by his contract under s 4 of the Statute of Frauds 1677, notwithstanding that it was not signed by the vendor. See *Laythoarp v Bryant* 132 ER 283. That case, however, does not apply to the present case because the Statute of Frauds 1677 is only in force in Sarawak but not in West Malaysia. See *MN Guha Majumder v RE Donough* [1974] 2 MLJ 114; *Diamond Peak Sdn Bhd & Anor v DR Tweedie* [1982] 1 MLJ 97 at p 103; and *Lee Phek Choo v Ang Guan Yau & Anor* [1975] 2 MLJ 146 at p 147. In another English case, the first question to be decided by the court was whether a written document signed by the client but not by the solicitor was 'an agreement in writing' within the meaning of s 4 of the Attorneys and Solicitors Act 1870. The court decided that the agreement was within the Act. See *Re Jones* [1895] 2 Ch 719.

The two cases I have just cited were decided in accordance with the statutory provisions that were in force in England at the material time.

In *Re New Eberhardt Co* (1890) 43 Ch D 118, the Court of Appeal was asked to decide whether a document which was executed by one party only and filed with the Registrar of Joint Stock Companies was 'a contract duly made in writing' within the meaning of s 25 of the Companies Act 1867. The court decided that the document merely contained an offer and it was not a contract within the meaning of s 25. I think the Court of Appeal, in construing the term 'a contract duly made in writing' in s 25, applied the common law principle to determine whether or not there was a contract in writing. In *Financings Ltd v Stimson* [1962] 3 All ER 386; [1962] 1 WLR 1184, the defendant saw an Austin motor car on the premises of Stanmore Motor Co advertised for sale at £350. On 16 March 1961, he signed a hire purchase agreement form, which was produced by Stanmore Motor Co. The Court of Appeal decided that in law, no agreement was entered into. It was only an offer by the defendant to enter into a hire purchase agreement with Financings Ltd. The agreement form contained the following clause: 'This agreement shall become binding on the owner only upon acceptance by signature on behalf of the owner ...'.

The owner signed the agreement on 25 March 1961. On 18 March, the defendant paid the first instalment of £70 and Stanmore Motor Co allowed him to take the car away. He was not satisfied with the car and on 20 March, he returned the car to Stanmore Motor Co. Stanmore Motor Co and the defendant did not inform Financing Ltd that the car had been returned. On 23 March, the defendant cancelled the insurance cover note. On the night of 24/25 March, the car was stolen from Stanmore Motor Co's premises. When the car was recovered it was damaged. The plaintiff

sued the defendant for damages. The court decided that the offer was revoked when the defendant returned the car on 20 March and there was for that reason, no concluded contract.

In my opinion, the decisions of the Court of Appeal in *Re New Eberhardt Co* and *Financings Ltd v Stimson* are relevant to the present case. Applying the two cases to the facts of this case, I am of the view that the act of the respondent in signing the document only constituted an offer to enter into a sale and purchase agreement in respect of the machine. It is not in dispute that the appellant in the present case did not sign the document until today. In the circumstances, I hold that no sale and purchase agreement in writing had been entered into between the parties concerned.

For the reasons stated above, I allow the appeal with costs here and below.

15 April 1995

**Mahadev Shankar JCA**: Before this appeal was filed, the appellant was called Matang Factoring Sdn Bhd ('Matang'). Sim Lian Machinery Sdn Bhd ('Sim Lian') were in the business of selling industrial machinery. It assisted prospective purchasers by processing finance. Teh Hock Leong (PW3) ('the guarantor') was a director of Sim Lian. In 1985, Sim Lian sold a hydraulic press (hereafter referred to as 'the machine') to Pembinaan Siap Sdn Bhd ('the lessee'). A substantial portion of the purchase price was advanced by Matang. Ownership of the machine was vested in Matang. The machine was made the subject of a credit finance agreement ('the lease agreement'). Matang required PW3, Teh, to stand as guarantor for the lessee's performance and he did so.

One Teh Tong Heng (DW3, 'Heng'), was Matang's senior marketing executive. In December 1985, he informed the guarantor that the lessee was in arrears of instalments and that he could be sued. Heng also requested the guarantor to find a buyer for the machine which was then in the lessee's premises at Batu Pahat.

On 2 February 1986, the guarantor took Peh Hai Ling ('Peh') to see the machine. Peh is the managing director of Metalco Industrial Sdn Bhd ('Metalco') who is the respondent in this appeal. (Metalco was the plaintiff in the sessions court).

On 3 February 1986, the guarantor took Peh to see Ong Ah Kiat ('Ong') at Matang's office in Johor Bahru. Ong was Matang's general manager.

It is common ground that on that day, Metalco agreed to buy and Heller agreed to sell the machine to Metalco for RM65,000. It is also common ground that the sale was subject to a condition precedent that Heller would only give title to the machine if upon repossession and termination of the lease, the lessee did not exercise its rights of redemption within the 14-day period provided by the lease. It is also common ground

A that pursuant to the agreement Matang did, on 18 and 19 February, authorize the guarantor to repossess the machine on its behalf and allow Metalco to remove the machine from the lessee's premises and transport it to Metalco's factory in Pandan, Johor Bahru.

Matang claimed this sale was subject to another condition ('the B second condition'), namely, that in the event of Matang obtaining a higher offer for the machine than the RM65,000 by Metalco, and Metalco not being prepared to better that offer, Matang would be entitled to repossess the machine from Metalco and sell it to the highest bidder. In that event, Matang said it would reimburse the transport expenses incurred by Metalco in having the machine moved from Batu Pahat to Pandan. Metalco denied C the existence of this condition claiming that the sale would be concluded automatically upon the lessee's failure to exercise its right of redemption.

Effectively this was the only issue on the question of liability. The sessions judge found for Matang. Metalco appealed to the High Court, which reversed the sessions judge's finding and awarded damages. By way D of alternative, it was submitted that even if liability was established, the various heads of damages awarded should be set aside. Although the memorandum of appeal prays for a new trial as a further alternative, this course was not urged upon us by the appellant's counsel.

The issue as to whether the sale was subject to the second condition E is one which to a considerable extent involved the credibility of the witnesses called by either side. The appellant's counsel cited a long line of authorities commencing with *Watt (or Thomas) v Thomas* [1947] AC 484 at pp 487–488; [1947] 1 All ER 582 at p 587, and ending with *Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor* [1979] 2 MLJ 207 (a running-down action which ended in the Privy Council) and *Chow Yee* F *Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 (another Privy Council decision where the issue was whether the deceased was in full possession of his mental faculties when he put his thumbprint on a cheque). These cases, especially the powerful judgment of Viscount Sankey LC in *Powell v Streatham Manor Nursing Home* [1935] AC 243; [1935] All ER Rep 58 G (set out at length in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 at p 42) were relied upon for the proposition that the judge should not have interfered with the sessions judge's finding for Matang that there was a second condition and therefore no concluded contract.

In response, we refer to what Lord Goff of Chieveley said in *Grace* H *Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 at pp 264–265:

> Before their Lordships Mr Hunter, for Hai Nguan, submitted that the issue on his point was essentially one of credibility; and that, by interfering with the decision of the judge, the Court of Appeal had failed to have proper regard to the many statements by the House of Lords regarding the limited I circumstances in which an appellate court may interfere with a conclusion of a trial judge on such an issue. The classic statement of principle is perhaps that of Lord Thankerton in *Watt (Thomas) v Thomas*, when he said ([1947] AC 484 at pp 487–488; [1947] 1 All ER 582 at p 587):

> 'I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: (i) where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (ii) the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (iii) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'

Lord Thankerton however added this rider to his statement of principle:

> 'It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.'

That is indeed the case. And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep, when he said at p 57:

> 'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'

That observation is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

The Court of Appeal did not refer to *Watt v Thomas*, or to any other of the relevant authorities, in their judgment. But their Lordships are very conscious that the Court of Appeal were dealing with this particular issue only briefly; and they have little doubt that they had the authorities in mind, and that, having considered the overall probabilities in a case where the oral evidence was, in the nature of things, likely to be unreliable, they concluded that these pointed overwhelmingly to a different conclusion from that

reached by the judge. Having considered the evidence and the judgment of Choor Singh J, their Lordships have come to the conclusion that the Court of Appeal were fully justified in acting as they did.

Metalco's cause of action accrued in March 1986. Not until 7 November 1988 did Peh's daughter, PW1, give evidence. Peh, PW2, followed on 11 January 1989. Cross-examination began on 20 February 1989, again on 11 April 1989 and 12 April 1989. The next hearing was on 8 July 1989 when PW3 the guarantor gave evidence. It was adjourned to 20 September 1989 but only got started again on 8 November 1989. By then, the guarantor had been admitted to hospital and his cross-examination had to be postponed. PW4 and other witnesses as to damages claimed were called. After his discharge from hospital PW3, the guarantor, was cross-examined on 10 January 1990. The first defence witness commenced his evidence on 13 January 1990.

The significance of these dates is that the witnesses were testifying to events which occurred three or more years ago. Therefore, whether or not there was a second condition had to be determined on the totality of the evidence with particular reference to the contemporaneous documents.

The lessee's troubles began in 1985. On 2 November 1995, Matang issued an AR registered letter to the lessee giving notice of its intention to repossess the machine on the expiry of seven days from service unless arrears of instalments, interest and other charges amounting to RM12,707.40 were paid before 9 November 1985. A copy of this letter was extended to all the persons who guaranteed performance, including the guarantor, Teh Kok Leong.

At the trial, the defence suggested to the guarantor that he was also a shareholder and/or a director of the lessee and also led evidence through one Low Boon Kang ('Low') of Nam Chuan Industries ('Nam Chuan') to that effect. It was also alleged that the guarantor wanted the machine moved from Batu Pahat to Pandan to avoid a distress suit by the lessee's landlords because the lessee had not paid its rentals.

Although the guarantor denied these suggestions, it is common ground that Matang had told the guarantor that he would be sued to make good the lessee's indebtness. It is a reasonable inference that the guarantor's motive in ensuring that the machine was sold, was that it would effectively reduce his own liability to Matang. He therefore had an interest in prospective purchasers.

Low is a partner of Nam Chuan in Pontian. In January 1986, he saw the guarantor in Johor Bahru and offered RM60,000. The offer was not pursued because the guarantor did not think Low was serious.

Peh came on the scene on 2 February 1986 and saw the guarantor, was taken to see the machine and was serious about putting his money where his mouth is. The guarantor and Peh then saw Matang's branch manager on 3 February 1986 with the results aforesaid. Acting on the basis that he would become absolute owner of the machine at the end of the redemption period, Peh dismantled the machine at Batu Pahat on 18 and

19 February and transported it to his factory at Pandan, Johor Bahru at a cost of RM9,020 including crane service. Upon the expiry of the redemption period, Metalco incurred a further RM9,750 to excavate and construct a concrete foundation for the machine. On 21 March, Peh left by air for Taiwan to arrange for the machine to be modified. He incurred a further RM4,000 for this trip. On his return on 29 March 1986, he was informed by his daughter, PW1, that Matang had come with their workmen into the Pandan factory and taken away the machine. Peh said he saw Ong and protested and Ong admitted a mistake had been made and agreed to pay compensation. Peh then proceeded to obtain the documents to vouch for his special damages and submitted a written demand on 13 May 1986. Matang replied denying liability only on 31 July 1986 ('the reply letter'). These proceedings were filed shortly afterwards.

In mid-March, that is to say after the redemption period had expired, Loh saw Heng, Matang's senior marketing executive, and offered RM70,000 for the machine. It is a reasonable inference that it was at this point that Heng saw an opportunity of getting a higher price than that agreed with Metalco. On 18 March 1986, Matang placed an advertisement in the *Nanyang Siang Pau* calling for offers. The cut-off date was 31 July 1986. On 21 March 1986, Matang claimed that it had telephoned Peh that it received an offer of RM85,000 and asked Peh to better it but Peh declined to do so. So Matang repossessed the machine on 25 March 1986 and sold it to Nam Chuan on that day even though there were another six days to go for other offers from the public.

Matang had been conducting its business by the use of standardized forms. Where repossessed machinery was to be sold it had a standard 'Offer to purchase' form which provided a space for the insertion of the conditions of sale. If a sale was intended, it had a standard sale and purchase agreement.

The document upon which Matang obtained Peh's signature on 3 February 1986 was *not* the standard 'Offer to purchase' but the standard sale and purchase agreement. The price of RM65,000 was entered into the third schedule document. The guarantor signed as a witness.

It was strenuously submitted that because Matang had not dated or signed this document, there could be no concluded contract. We are unable to subscribe to this view. The true position is that where a contract has been signed by one party only, it can be enforced where there is evidence that the other party has elected to be bound by it. (See the cases in 12 *English and Empire Digest* (Contract) at p 193 para 1166 where *Buckhouse v Crossby* (1737) 2 Eq Cas Abr 32; 22 ER 28 and other cases are referred to.) Part performance by one party, accepted by the other, is such other evidence. Delivery on 19 February was part performance.

The effect of Peh's signing the sales agreement in our view was that it became enforceable against Metalco, subject to the observation that this was a conditional sale where delivery of the goods and transfer of title had been postponed. Thus the sale agreement standing by itself was not the

A contract but only evidence of a part of the overall terms of an oral contract made on 3 February 1986.

There are serious flaws in Matang's contention that on 3 February, it had only taken note of Peh's offer of RM65,000 subject to the condition that it was at liberty to accept any higher offer that was subsequently B received, because if this was the case:

(i) there is no explanation why Matang did not use its 'Offer to purchase' form;

(ii) why could Matang not have simply typed in another clause in the sale agreement that it reserved the right to take any higher offer (as it did C for Low's offer on 21 March or thereafter); and

(iii) it has to follow that although Metalco was going to be saddled with the expense and inconvenience of transporting the machine to Johor Bahru and keeping it there, Matang could come back at some indefinite date in future and reverse the transaction on the ground D that it had received a higher offer.

Other factors which cast a heavy shadow on the alleged existence of a second condition now follow. In the reply letter, it was stated higher offers were received from 19 to 24 March. In para 9 of the defence, it was pleaded that higher offers were received from third parties between E 19 February and the advertisement on 18 March. In point of fact, there was only one offer in mid-March for RM70,000.

In para 10 of the defence, it was pleaded that as soon as the offer of RM85,000 was received, the defendants contacted Peh whether he wanted to buy at RM85,000 but he could not make up his mind and delayed F giving a reply despite repeated requests for an answer.

In para 11, it was pleaded that Peh then left for Taiwan, told the defendants he was leaving his daughter in charge to make a decision, and various calls were made to her to confirm but she did not do so and Matang then told the daughter on 25 March that they would repossess on 26 March and she agreed.

G The daughter (PW1) and Peh (PW2) denied these allegations and there was a gap of six months before the defendants gave their evidence. The documents tendered by the defence contradicted the defendants' pleadings because repeated requests to Peh before he left for Taiwan could not have taken place because there was only one offer for RM85,000 and H that was on 21 March after Peh had already left for Taiwan.

A further contradiction — the defence pleaded that the machine was repossessed on 26 March 1986. According to the evidence of PW1 and DW3, it was repossessed on 25 March. This detail may seem minor but closer scrutiny suggests something else. With Nam Chuan's letter of I 21 March stating an offer of RM70,000, the offer letter allegedly being executed only after a double trip to Pontian that day but still being undated, and Matang's solicitors' reply letter dated 31 July 1986 stating that higher offers were received between 19 and 24 March, it would be

more reasonable to infer that the one and only final offer of RM85,000 by Nam Chuan was made on 24 March.

The plaintiff's solicitors challenged the existence of the second condition from the moment the defence was served and applied for further and better particulars. In answer, the defence stated 'Teh Kong Keng (sic) the senior marketing manager had repeatedly phoned Peh from Matang's Johor Bahru's office during office hours between 18 March 1986 to 26 March 1986'.

Being bound by this pleading, it is clear that the defendants tailored their subsequent evidence to fit Peh's evidence that he had left for Taiwan on 21 March. It is also clear that this alleged second condition was a blatant untruth designed to justify a wrongful act.

The allegation that the defendants were duty bound to get the highest price to avoid being sued by the lessee was another smokescreen because all along it was Matang's case that Low was a director of the lessee and had himself arranged the price at which the machine should be sold to Metalco (see para 4(2) of the defence). In his cross-examination by Matang's counsel, this was put to him as the defence case. Since we are concerned with Matang's state of mind on 3 February 1986, this is crucial because if the lessee's director agreed to RM65,000, there was no need to look further for any higher offer.

This is a convenient point to consider another piece of evidence which was the cornerstone of Matang's case. In the final stages of the cross-examination of the guarantor, the evidence recorded is as follows:

Q: Did you hear Ong say sale couldn't be concluded at that time and subject to condition?

A: Yes.

Q: One of the conditions is that offered by PW2 is the highest?

A: Agreed.

Q: This is because the machine would subsequently be advertised for sale?

A: Yes.

Q: When advertised there would other bids and sale will be confirmed if PW2's offer is highest.

A: That is not with my knowledge.

Q: Can you remember what was said?

A: I didn't hear that discussion.

Q: Do you remember whether the time for payment was mentioned?

A: Don't know.

Q: Do you remember if anything was mentioned about Matang giving Pembinaan Siap Sdn Bhd 14 days' notice to buy back the machine?

A: Not within my knowledge.

Q: Heard any mention about the repossession charges?

A: No.

Q: Heard any discussion on storage charges?

A: No.

Q: Do you remember whether anything was discussed about payment of deposit?

A: I do not know.

Q: Do you know anything about the signing of the agreement by PW2 at meeting?

A: Yes. I was the witness.

Q: Do you remember whether any reason was given by Ong why Matang didn't want to sign the agreement at that time?

A: Yes. Ong did give a reason.

Q: I put to you the reason given by Ong was that there was no sale at that point of time yet until Matang had advertised and received other offers and determined that PW2's offer was the highest and also if Pembinaan Siap Sdn Bhd does not wish to redeem the machine within 14 days.

A: Agreed.

This last question and answer was taken in isolation by the sessions judge and held to be fatal to Metalco's case. Haidar J did not think so. It was strenuously submitted before us that he was not entitled to take this view because he had not tried the case in the first instance and should not have interfered.

At first brush we too were quite taken up with this argument but upon further reflection, it is our view that this answer should not have been given the undue weight accorded to it by the sessions judge by appellant's counsel.

Haidar J in his judgment pointed out that the guarantor had stated in his re-examination that his answer suggesting that there was a second condition was wrong and the reason he gave was that too many questions were asked and he had just recovered from his illness. Matang's counsel emphasized that this answer in re-examination was being given after the lunch break, leaving it to be implied that the guarantor must have been 'touched up' in the interim.

It is well established that when two inferences are equally open from the same set of facts, the sinister inference is not preferred. In his evidence-in-chief on 8 July 1989 before he fell ill, the guarantor was clear there was only one condition. His cross-examination came six months later on 13 January 1990. We have advisedly reproduced the entire questions and answers which went to establish that the guarantor did not hear the discussion between Mr Ong, Matang's branch manager and Peh about any advertisement for higher offers or the time for payment for Metalco, or the grant of a redemption period of 14 days to the lessee or the issue of transport or storage charges. The sequence of these answers, all of which related to the one and only discussion between Peh and Ong on 3 February, cannot be reconciled with last answer upon which Matang so heavily relies.

We also agree with Mr Tan that the form of the question was offensive because it was triple-barrelled. The guarantor was speaking in Mandarin and the interpretation of questions loaded in this way could easily cause confusion. This is one of the reasons for s 143(a) of the Evidence Act 1950 which forbids questions in cross-examination which literally puts words into the mouth of the witness. One question each time is therefore the preferred approach. Above all however, everybody concerned appears to have overlooked that PW3, the guarantor, was *not* the plaintiff, *nor* was he the plaintiff's servant or agent. (Had it been Peh who gave this answer, the consequences could have been fatal. But despite a very lengthy cross-examination, he was unshaken. There was no question of the second condition.) The guarantor's admission therefore could not bind Metalco. It was only one of the points which went to the credibility of the plaintiff's case, and no weight should have been accorded to this isolated answer in the context of the rest of his evidence.

Again it is more than curious that a separate letter also dated 25 March 1986 from Matang to Nam Chuan forwarding the invoice and sale and purchase agreement for immediate action was not acted upon immediately. Nam Chuan's sale and purchase agreement is dated 13 May 1986. The defence did not produce the invoice nor did it produce any evidence to show when Nam Chuan paid the deposit on the RM85,000. These are serious gaps on a matter which went to the root of the defence that there was a second agreed condition. The onus was upon them to prove this second condition and they totally failed to do so. The only inference is that this alleged second condition was fabricated after mid-March by Matang's marketing manager Heng and the branch manager to get out of its commitment to Metalco.

That this was the correct conclusion is borne out by the subsequent conduct of the parties. Peh's evidence was that upon his return from Taiwan, he was told by his daughter of the seizure and removal of the machine and he promptly confronted Ong who admitted a mistake had been made and promised to compensate the plaintiff for the losses it had suffered. The defence case was a denial that any such meeting or promise ever took place. If this was so, the demand letter of the plaintiff for compensation must have come out of the blue. This document dated 13 May 1986 was a very detailed account of Peh's version of the matter which substantially set out his subsequent evidence in court. Seven days' notice was given for Matang to respond, failing which Metalco said they would go to court.

This letter cried out for an answer. If Ong or Heng believed for a moment that there was a second condition they should have responded immediately. This they did not do. Not until 31 July 1986 did Matang revert with a letter from its solicitors. This letter reads as follows:

> We are instructed that about end of January or early February 1986 there was a discussion between our clients, one Mr Peh Hai Lim and Mr Teh Hok Leong, on the intended sale of the above machine to your clients. It

was agreed in principle that the selling price of the machine would be RM65,000 but subject to the following terms:

1 That the machine would be sold to your clients only if there were no other higher prices offered.

2 Payment must be settled in full by February or early March 1986.

3 Priority was to be given to the lessees to redeem the machine.

Subsequently on 19 February 1986, the said machine was repossessed by Mr Teh Hok Leong. Between 19 and 24 March 1986, offers higher than RM65,000 were received. Our clients informed your clients and offered to sell the machine to your clients at RM85,000, the highest offer received. Your clients did not respond whereupon our clients sold the said machine at RM85,000.

In view of the circumstances, there was no concluded contract for the sale of the said machine to your clients and therefore there could be no breach on our clients' part.

Apart from the delay, there are other features in this letter which prove that the defence was an afterthought. The letter studiously avoids any reference to the sale and purchase agreement which the plaintiff said Peh was required to sign. There is no mention of any proposed advertisement calling for higher offers. The second term requiring payment in full by early March made it clear that the contract would be concluded by February or early March which supports the plaintiff's case that title was to pass at the end of the redemption period.

Clauses 2 and 3 in the sale and purchase agreement should be noted. They read:

(2) The buyer shall be responsible for taking delivery of the goods/equipment from the premises specified in the second schedule hereto and all expenses incurred thereby shall be for the account of the buyer. Provided always that the property in the goods/equipment and the risk thereof shall pass from the seller to the buyer upon the execution of this agreement notwithstanding that the buyer may not have taken actual physical possession of the said goods/equipment.

(3) The price of the said goods/equipment shall be as stated in the third schedule hereto which sum shall be paid in full by the buyer to the seller simultaneously with the execution of this agreement unless otherwise specifically agreed between the two parties, the receipt of which sum the seller hereby acknowledges.

The same day Matang obtained the signature of Peh to a second document, also undated. It reads:

I/we hereby acknowledge and agree that the undermentioned equipment/goods to be stored in premises at Lot Nos 99, 100 and 101, 7½ miles, Taman Pandan, Pandan, Johor without any storage fees or other charges till equipment/goods is removed from the premise or otherwise dealt with.

Equipment/goods hereinbefore referred to:

One (1) unit New Hydraulic Press 300 ton with standard accessories complete with option accessories.

Model No: TD–3 Serial No: 800674

In our view, the effect of these two documents was that if the lessee exercised its right of redemption then Matang would be entitled to remove the machine from Pandan themselves or deal with it as Matang thought fit. In that event, the oral agreement was that Metalco would not be entitled to storage or other charges except the transport and removal costs Metalco had already incurred which Matang had orally agreed to pay. If the redemption was not exercised, cl 2 shows that the property and the risk passed to Metalco immediately upon possession of the machine being taken by Metalco. Contractually, all that was left was Matang's claim for RM65,000 from Metalco.

The intransigence of the defendant is further revealed by another factor. On 3 February 1986, the parties agreed that if the lessee redeemed the machine, Matang would reimburse the plaintiff for the expenses Metalco incurred in transporting the machine from Batu Pahat to Pandan. The plaintiff's demand letter itemized this loss and furnished back-up receipts. The defendant's response in the reply letter was that they were 'not in any way liable' for the plaintiff's loss and damages.

Subsequently in its defence, it was admitted that the transport charges would be reimbursed but only to the extent of RM3,000 and evidence to this effect was also given by Matang's witnesses. The point however is that the defendant did not even have the grace to pay the plaintiff what it admitted it owed.

The sessions judge was obviously troubled by this but dealt with it in a most unusual way which completely flawed his judgment. When the parties returned to hear his verdict, he asked if there was a possibility of compromise on the transport charges and offered the plaintiff a choice of accepting a finding of 'I dismiss this case with costs' or 'I dismiss this case with costs except that the defendant pays the plaintiff RM8,500 as transport costs'.

Faced with this situation, plaintiff's counsel accepted dismissal with costs. Had matters been left there, the defendant would have got away with the RM8,500. It is not irrelevant that Matang did not subsequently pay RM8,500 at any stage. Why? Awkward questions would then have arisen as to how it was possible to believe Peh on the promise to reimburse the transport charges and not the rest of his evidence, or why the defendant's witnesses should have been believed at all on the rest of their evidence if they were disbelieved on their last ditch efforts to limit their losses to RM3,000. Unless the plaintiff went to court and fought its claim all the way through, it would have got nothing.

The points we have raised here were not properly considered by the sessions judge and we regret to say he was plainly wrong. This was not an easy case to try and the long intervals between one hearing and the next may have compounded his difficulties but the fact remains that even though he had the benefit of seeing the witnesses, the decision he reached cannot be sustained. We think that on the issue of liability, the appeal was properly allowed.

*The measure of damages*

In para 3 of the amended statement of claim, Metalco pleaded that by an oral agreement reached on 3 February 1986, Matang had sold the machine for RM65,000 subject to the lessee's right of redemption which if exercised would entitled Metalco to be reimbursed for all expenses incurred in removing, transporting and storing the machine in Pandan. In para 9, Metalco pleaded that whilst Peh was away in Taiwan, Matang sold the machine to a third party for RM85,000 and removed the machine from the plaintiff's premises despite the plaintiff's protests. In para 11, the plaintiff pleaded that the defendant was in breach of its oral agreement. It was also pleaded that Metalco had suffered special damages which were listed as follows:

| | | |
|---|---|---|
| (i) | Removal expenses | RM8,500 |
| (ii) | Crane service | RM520 |
| (iii) | Construction of concrete foundation | RM9,750 |
| (iv) | Storage charges | RM4,000 |
| (v) | Travelling and subsistence allowance in Taiwan | RM4,000 |
| (vi) | Refilling and resurfacing the excavation for the foundation of the machine | RM2,000 |
| (vii) | Loss of bargain | RM20,000 |

In the court below, Haidar J decided the measure of damages as that provided by s 74(1) of the Contracts Act 1950. In other words, he applied the rule of *Hadley v Baxendale* [1843–60] All ER Rep 461; (1854) 9 Exch 341 and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; [1949] 1 All ER 997 both of which are referred to in *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171. He disallowed the Taiwan expenses because Peh knew the machine needed modifications in any event.

Before us, Matang's counsel again argued the issue as if it was purely a question of applying s 74(1) of the Contracts Act 1950. He referred to *C & P Haulage (a firm) v Middleton* [1983] 3 All ER 94 [1983] 1 WLR 1461, *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, *Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd* [1994] 1 MLJ 553, and *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292; [1953] 2 All ER 1257; [1953] 3 WLR 923 and submitted that Metalco was only entitled to RM20,000 for loss of profits and nothing else, because had Metalco got the machine for RM85,000 they would still have incurred all the special damages claimed and therefore these heads of damage should be disallowed.

Mr Tan, counsel for Metalco, was only of limited assistance to us on this aspect of the case. He submitted that the property in the machine had passed to Metalco upon the expiry of the redemption period and a common sense approach required that Metalco be awarded everything it claimed.

The facts here were somewhat unusual. Metalco had pleaded and proved that title to the machine had passed before Matang wrongfully seized it on 25 March 1986. Quite simply by 24 March, Metalco had incurred every item of expenditure it claimed by way of special damage (except the hole in the ground left behind when the machine was removed and which had to be filled). Without the machine, all this expenditure was useless.

This machine was not a standard item like a used car, readily available on the market. It was a custom-built metal press which cost over RM350,000 new. In just over a year, it was repossessed and sold by Matang for RM65,000. Since Metalco had proved its case, it was for Matang to show that other secondhand machines were readily available in terms of specification or price. There was no such evidence. In fact, Metalco's evidence was that after this set-back it could not pursue this line of activity.

What then is the proper measure of damages in such a situation? It is that sum of money which would restore Metalco to its status before the seizure, ie the difference in the price at which they bought the machine on 3 February and the price at which it was sold on 25 March plus all the abortive expenditure Metalco had incurred. It is a misconception to say that this abortive expenditure would been incurred in any event when they purchased an alternative machine because none was shown to be available. To put it into legal language, the true measure of damage here was that sum of money which would restore Metalco to the status quo ante!

I would add here that the facts pleaded and proved not only gave rise to a cause of action for breach of contract in that Metalco did not confine itself to a demand for the agreed purchase price of RM65,000, but also established that Matang had committed conversion — *Aronson v Mologa Holzindustrie AG Leningrad* (1927) 32 Com Cas 276; (1927) 138 LT 470 is very much in point. There, the seller of goods resold them to a third party, after the property in the goods had passed to the buyer. Reference may also be made to *McGregor on Damages* (15th Ed) para 727 at p 469, and *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17 at p 21 where Thomson LP said:

> *Again, had there been no possibility of obtaining substituted goods the measure of damages would have been the full estimated loss of profit resulting from the appellant's repudiation of the contract.* (Emphasis added.)

In the context of the present case, I would substitute for the 'full estimated loss of profit', the full proven loss of Metalco — they lost both the machine and all the money they had spent to get it there and put it in proper working order.

In these circumstances, we hold that this appeal be dismissed and that the appellants do pay the respondents RM48,770 with interest thereon at 8%pa from 25 March 1986 up till realization.

A word about costs. It will be remembered that on the evidence, the defendants admitted that they were liable to reimburse Metalco their transport and removal costs in the event of their repossessing the machine.

After the trial, the sessions judge found the defendants liable to reimburse RM8,500 in any event. Metalco was obliged to sue for this and the sessions judge should have given the plaintiff their costs — Mr Tan cited *Manikam Mandor v S Muriandi Thevar* [1939] MLJ 130. We referred to *Jag Singh v Toong Fong Omnibus Co Ltd (No 2)* [1962] MLJ 122 on appeal at p 271.

In the light of our judgment however, the appellant must pay Metalco's taxed costs in the sessions court, High Court and in the Court of Appeal. The appellant's deposit must be paid to the respondent in satisfaction pro tanto.

20 April 1995

**Abu Mansor JCA:** This is an appeal against the decision of Haidar J allowing the appeal, in the court below, of the respondent/plaintiff herein from the judgment of the learned sessions court judge, who had dismissed the claim of the plaintiff for damages for breach of contract for the sale of machinery between the present appellant/defendant and plaintiff.

The facts of the case are seriously disputed by the parties to the agreement and, speaking for myself, they required my close scrutiny before appreciating their true significance. The plaintiff/respondent alleged that they had bought the machinery after having negotiated for its purchase on 3 March 1986 at a price of RM65,000 subject to one condition only that the sale would be completed if there was no redemption by the lessee within 14 days of the repossession on or about 19 February 1986.

The defendant/appellant, on the other hand, contended that the alleged sale was not a true sale but was subject to one other additional condition that there was no higher offer in the future without limitation of time.

After having heard the submissions of parties, I accept and agree with the submission of the respondent's counsel, Mr Tan Hock Kim, that, on the balance of probabilities, the respondent's case is more to be believed and by the same token, I reject the version of the appellant as unreasonable.

It was clear to me and I find that the price of RM65,000 was what was obtainable at that time, and the price was typed into an agreement which the defendant made the plaintiff sign (though the defendant did not sign it). If indeed the sale was subject to a condition of a higher offer, it would have presented no difficulty for the defendant to have stated it so in the agreement.

Following from this agreement, what was the subsequent conduct of the parties? I make a finding they showed agreement. The plaintiff was allowed by the defendants (DW2 and DW3 were present) to have the machinery removed and transported to the premises of the plaintiff at the plaintiff's expense and the plaintiff had to further incur expense to have the machine installed and erected by having to prepare a concrete foundation for it. The plaintiff then made a trip to visit Taiwan to arrange for the modifications of the machine.

As I have said, I make a finding that, the evidence as a whole, is consistent with the plaintiff having been made the owner of the machine and my short answer to the defendant's contention otherwise, is that it is unreasonable and certainly not 'business' for the plaintiff to have agreed to the additional condition of having the sale subject to the highest bidder for an unlimited time.

It is trite law that the appellate court would not lightly reverse the finding of a court that heard and saw the witnesses but I am of the view, speaking for myself, the learned judge had acted correctly, having considered the evidence before him, to reverse the finding of the sessions court judge and I agree with him that there was a concluded agreement of sale of the machine. The defendant's subsequent action of repossession of the machine from the plaintiff was a breach of contract for which the plaintiff was entitled to damages. Since that is my decision, I have no hesitation in dismissing the appellant's appeal and confirming the decision of the learned judge.

After having completed the above judgment, I have had the benefit of reading the judgments of my brother judge, Zakaria Yatim JCA as well as the judgment of my brother, Mahadev Shankar JCA. I agree with and I adopt the judgment of Mahadev Shankar JCA.

*Appeal dismissed.*

Reported by Kevin Ooi